

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CAYSTANO J. GARNICA

Claimant

VS.

THE BOEING COMPANY

Respondent

AND

AMERICAN MANUFACTURERS MUTUAL INS.

Insurance Carrier

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Docket No. 228,939

ORDER

Respondent and its insurance carrier appeal from the January 20, 1998 preliminary hearing Order and the February 24, 1998 Order Nunc Pro Tunc entered by Administrative Law Judge John D. Clark.

ISSUES

The Administrative Law Judge authorized Robert L. Eyster, M.D., to treat claimant's left knee and authorized Duane Murphy, M.D., to treat claimant's left ankle. Medical benefits were ordered paid by respondent. In its Request for Review, respondent identified the issues as "compensability" and written claim. A review of the record reveals that respondent did not raise an issue concerning written claim before the Administrative Law Judge. It will not, therefore, be considered by the Appeals Board upon this review.

The thrust of the compensability issue concerns whether the claimant's need for medical treatment for his left knee and ankle is the result of claimant's earlier work-related injury, or is instead the result of a subsequent, intervening accident unrelated to claimant's employment with respondent. Claimant argues that the injuries suffered when his knee gave way on November 24, 1997 are the direct and natural result of the left knee injury he suffered at work on June 1, 1996. The issue for review is whether the November 24, 1997 injury arose out of and in the course of claimant's employment. Also, claimant raises an issue concerning whether the Appeals Board has jurisdiction to review the Administrative Law Judge's Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the record and considered the briefs of the parties, the Appeals Board finds for purposes of preliminary hearing as follows:

The Appeals Board has jurisdiction over the compensability issue raised by respondent because it presents a dispute as to whether or not the injury claimant suffered away from work on November 24, 1997 can be found compensable as an injury that arose out of and in the course of claimant's employment with respondent. This is an issue that is considered jurisdictional and that may be appealed from a preliminary hearing order. K.S.A. 1997 Supp. 44-534a.

Respondent admits claimant sustained a work-related left knee injury on June 1, 1996. Medical treatment was provided by respondent for that injury. Claimant was treated by Dr. Eyster who released claimant to return to work without restrictions on June 18, 1996. At that time, Dr. Eyster reported that claimant had no permanent impairment.

Claimant reports two specific incidents when his left knee has given way since the initial injury. In August 1996 claimant was driving to Arkansas on a vacation. He stopped in Tulsa, Oklahoma, and his knee gave way when getting out of his car. Claimant returned to Dr. Eyster for treatment following that incident but continued working without restrictions.

On November 24, 1997, claimant's left knee gave way while he was walking, causing him to fall and injure his left ankle. This incident did not occur while claimant was working, but claimant alleges he is entitled to workers compensation benefits to treat this aggravation of his left knee injury and the left ankle injury because these injuries are a natural and probable consequence of his original work-related accident. Conversely, respondent argues the most recent incident constitutes a separate, intervening accident and, therefore, is not compensable.

The Administrative Law Judge agreed with claimant and ordered respondent to provide medical benefits. The conclusion by the Administrative Law Judge, that claimant's present condition is the result of his original accident at work and thus is not the result of any subsequent, intervening injury, rests largely upon the claimant's testimony that he had no left knee problems before the June 1, 1996 injury at work. Furthermore, claimant testified that his left knee never recovered fully from the June 1, 1996 injury at work. He describes being bothered with a popping in the left knee and occasional pain and stiffness since that injury at work.

In general, the medical records support claimant's testimony concerning the progression of his injury and his ongoing symptomatology. Claimant was initially seen by Dr. Eyster on June 4, 1996. At that time, Dr. Eyster believed claimant could continue to do his regular work as long as he was not doing repetitive squatting. When claimant

returned to Dr. Eyster for his two-week follow-up appointment on June 18, 1996, Dr. Eyster reported claimant's knee was "markedly improved." Claimant was released to return to his regular work without restrictions, but was instructed to return if his symptoms increased. Claimant did not return to Dr. Eyster or report any symptoms, however, until August 14, 1996 following the incident that occurred while claimant was exiting his vehicle. At that time Dr. Eyster ordered physical therapy. Those records reflect that claimant reported changing job duties following his injury in June of 1996 because of left knee pain. The physical therapist described claimant having minimal pain to palpation and slightly decreased strength but otherwise an essentially normal examination. Claimant reported that walking caused his symptoms to increase and that he had not been able to exercise, which had resulted in weight gain. The physical therapist recommended a regular exercise program. It appears the physical therapy was limited to a single visit and was to be followed by claimant performing exercises on his own.

Dr. Eyster issued a report dated September 10, 1996, which ruled out surgery. He found claimant's femoral irritation to have improved but anticipated there would still be days when claimant would have some symptomatology in his knee. Claimant was released to continue his regular work, with anti-inflammatory medication and frequent exercises recommended. It does not appear that claimant sought medical treatment again until after the incident on November 24, 1997.

Dr. Eyster does not give a definitive opinion relating the November 24, 1997 incident to the June 1, 1996 accident, but this does seem to be what he believes occurred. His office note of November 26, 1997 reads in part:

This does seem to be the same process that I saw the pt. [patient] for back in September 1996. Pt. thinks that this should be associated with work comp. I do not have an absolute opinion one way or the other in that regard except that he stated that he never had any knee pain prior to the knee injury of 6/1/96. He at that time improved with exercises and then he aggravated it with a long car trip and now he's having knee sort of symptomatology. A case could be made that had it not been for the work injury which started these symptoms at work that he wouldn't be having them now.

The medical records support claimant's testimony concerning ongoing symptomatology. But given the length of time that passed between the June 1, 1996 accident at work and the November 24, 1997 incident, a more definitive medical opinion concerning causation would have been desirable. Because Dr. Eyster treated claimant following both accidents, he is in the best position to state whether the November 1997 incident was a direct and natural consequence of the June 1996 work-related accidental injury. His choice of wording concerning causation, however, is not so much viewed as a reluctance to find a causal connection as it is an unwillingness to invade the province of the Administrative Law Judge concerning whether the incident should be associated with workers compensation. Dr. Eyster seems to be making a causal connection between this

November 1997 incident and the June 1996 work-related injury. He states at another point in his November 26, 1997 report:

This pt. states that in spite of the exercises and occasional anti-inflammatory medication that his knee gives out on him. The other day he says his knee gave out. He twisted his ankle. . . . My impression is that it is the patella femoral joint as I thought before and usually exercises control that but, in this case, the pt. is stating that the exercises done vigorously are not controlling the symptomatology and he wants to take his chances with surgery improving the situation.

From the medical records taken as a whole, together with the claimant's testimony, the Appeals Board finds that claimant has met his burden of proving injury by accident arising out of and in the course of his employment. The award of preliminary benefits is affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order and Order Nunc Pro Tunc entered by Administrative Law Judge John D. Clark dated January 20, 1998 and February 24, 1998, respectively, should be, and are hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 1998.

BOARD MEMBER

c: Steven L. Foulston, Wichita, KS
Frederick L. Haag, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director